88-1001

Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1988

OIL, CHEMICAL AND ATOMIC WORKERS INTERNATIONAL UNION, AFL-CIO AND ITS LOCAL 5-857,

Petitioners,

v.

CONOCO, INC.

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

I. WHETHER THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT'S DECISION UPHOLDING THE VACATION OF THE ARBITRATOR'S AWARD SO BLATANTLY CONFLICTS AND DISREGARDS PRECEDENCE OF THE UNITED STATES SUPREME COURT TO WARRANT THE GRANTING OF A WRIT OF CERTIORARI IN THIS MATTER.

PARTIES TO THE PROCEEDING

Pursuant to Rule 21(b) Supreme Court Rules, the Petitioners state that the caption of the case contains the names of all parties.

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OPINION BELOW

The opinion of the Court of Appeals, entered *per curiam* and the district court's Findings of Fact and Conclusions of Law are unreported.

JURISDICTION

The judgment of the Court of Appeals for the Tenth Circuit was entered on September 12, 1988. No petitions for rehearing were filed in this matter. Further, no orders granting extensions of time within which to petition for certiorari have been entered by this Court. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Since this action deals solely with the issue of the authority of the courts below to overturn an arbitrator's award, there are no statutory provisions directly involved in this matter.

STATEMENT OF THE CASE

The Oil, Chemical and Atomic Workers International Union and its Local 5-857 (hereafter "OCAW") and Conoco are parties to a collective bargaining agreement. By that agreement the parties expressly agreed that Conoco may only discipline and discharge employees for just cause. By that agreement the parties have expressly agreed that any dispute regarding just cause *vel non* for such discipline or discharge shall, unless resolved by the parties in their four-step grievance procedure, be resolved by an arbitrator selected by the parties, and that the decision of the arbitrator on the matter at issue shall be final and binding on the parties.

For a long time, Conoco has had established "Rules of Conduct," which rules are received by employees at the time of their employment and periodically published or posted at conspicuous locations within the refinery. Prefatory language appearing with the list of rules states:

Employees are expected to behave in a responsible manner

> in the refinery. Following is a list of offenses for which employees *may* be disciplined. Severity of the discipline will be determined by the nature and frequency of infraction and *may* include termination. This list is not all-inclusive.

(Emphasis added.) Among the rules listed is one which states:

> 1. Violation of any criminal law or the commission of any other offense involving moral corruption (including physical attack on other employees), stealing, or making fraudulent records.

By letter of October 9, 1985, Conoco terminated Allen Streeter for wrongful possession of property belonging to Conoco. Thereafter, by its letter of October 18, 1985, the OCAW requested that Mr. Streeter be reinstated and made whole.

An arbitration hearing was eventually held before Arbitrator Preston J. Moore and in his opinion and award Arbitrator Moore states:

> *Opinion*: There are some comments that should be made prior to addressing the issues herein. This arbitrator has had numerous cases of theft, attempted theft, and a few cases regarding possession of stolen property. There can be no question that such offenses are serious violations of the work rules and are normally met with severe penalties such as discharge. Repeatedly, this arbitrator has stressed that theft is a discharge offense and the arbitrator has no authority to modify the discipline.
>
> At the same time, there has never been presented a case wherein the Employer has excused theft and assessed a suspension for theft, attempted theft, or possession of stolen goods. This Employer has in the past had three employees guilty of theft, attempted theft or possession of stolen property and has issued discipline from ten days to three weeks for such violations.
>
> It is recognized that this theft went over a period of years. The evidence indicates that part of the goods were stolen by relatives. However, the amount of goods stolen was in the

approximate sum of $5,900.00. The value of goods being stolen is not necessarily important in determining discharge. In *UAW v. Bell Helicopter* this arbitrator held that the goods that were involved in an attempted theft was a serious violation, and discharge could not be modified. Again, however, the Company had no past record of issuing lesser discipline for such an offense.

Of course, the reason for theft being such a serious offense in industry is that industry loses in the hundreds of millions, if not billions, of dollars every year by theft. Many times the cost of the goods to the employer is much more than the value to the employee who has taken the goods. Such theft constitutes a threat to the employment of the individuals involved and to the existence to the companies, in some circumstances.

At the same time, the Employer must treat all employees equally. If theft is a discharge offense, it must be equally applied to all employees. For that reason, and for the reason that such was not the case herein, the discipline assessed by the Employer is too severe because it is far, far in excess of any discipline assessed other employees. It is recognized that the theft herein was over a much longer period of time and amounts to much larger monetary value; however, those facts do not alter the situation that in comparison to previous discipline, this discipline is too severe.

For that reason, the Employer is directed to reinstate the grievant with seniority and all other rights unimpaired but without pay for time lost. He is not entitled to any compensation.

Thereafter, through verbal and written communication with Conoco, the Union sought to enforce the award. Instead of treating the award as final and binding, on July 30, 1986, Conoco filed an action in the United States District Court seeking vacation of the arbitration award, in response to which OCAW counterclaimed for enforcement of the award.

In its decision, the district court entered findings of fact, *inter alia* as follows:

***

V. The arbitrator in the arbitration opinion and award . . . made the following statements concerning employee theft from the employer:

> . . . There can be no question that such offenses are serious violations of the work rules and are normally met with severe penalty such as discharge. Repeatedly, this arbitrator has stressed that theft is a discharge offense and the arbitrator has no authority to modify the discipline.

Thus, the arbitrator determined that theft is a just cause for discharging an employee.

VI. The arbitrator, however, concluded that the employee Streeter could not be discharged because the other three incidents of employee theft resulted in only temporary suspension. The arbitrator states . . .:

> At the same time, the Employer must treat all employees equally. If theft is a discharge offense, it must be equally applied to all employees. For that reason and for the reason that such was not the case herein, the discipline assessed by the Employer is too severe because it is far, far in excess of any discipline assessed other employees . . .

VII. The Stipulated Statement of Facts clearly established that Streeter's theft was much more severe due to the number of items stolen, the value, and the fact that his thievery and concealment of stolen property persisted over his twenty-three years of employment. Streeter conceded that the approximate value of the many stolen or concealed items of property was $5,900.00.

VIII. In concluding that all incidents of employee theft must be treated equally, the arbitrator disregarded the Agreement between the parties as well as the facts of the Streeter theft and concealment, and thereby imposed his own brand of industrial justice.

IX. The Streeter theft and concealment of stolen property provided just cause for his discharge and the arbitrator's setting aside of the discharge and imposing a six-month suspension was arbitrary and did not draw its essence from the agreement.

The Trial Court also entered Conclusions of Law, including the following:

3. . . . In *Mistletoe Express Service, supra*, the Court of Appeals in vacating the arbitrator's award stated:

> In reducing the penalty from discharge to suspension, the arbitrator substituted his views of proper industrial relationships for the provisions of the contract. He expressly found that there was just cause for discipline. The contract says that the acts, which the arbitrator found are just cause for discipline, are just cause for discharge. The arbitrator may not rewrite the labor contract. (Citation omitted.)

4. The employee Rules of Conduct . . . which have been adopted and followed at the refinery for as long as the parties can remember, are an extension of the contract pursuant to the management rights given to Conoco by specific contractual provisions, as well as by recognized implied right.

The Rules of Employee Conduct . . . constitute the "common law of the shop" which the arbitrator was required to accept, respect and enforce. In the case of *United Steelworkers of America v. Warrior and Gulf Navigation Company*, 363 U.S. 574 (1960), Justice Douglas stated:

> There are too many people, too many problems, too many unforeseeable contingencies to make the words of the contract an exclusive source of rights and duties. One cannot reduce all the rules governing a community like an industrial plant to fifteen or even fifty pages. Within the sphere of collective bargaining, the institutional characteristics and the governmental nature of the collective bargaining process demand a common law of the shop which implements and furnishes the context of the agreement.

***

> The labor arbitrator's source of law is not confined to the express provisions of the contract, as the industrial common law — the practices of the industry and of the shop — is equally a part of the collective bargaining agreement although not expressed in it. (Citations omitted.)

5. Management has the right unilaterally to establish reasonable plant rules not inconsistent with law or the collective bargaining agreement. The test of the reasonableness of a plant rule is "whether or not the rule is reasonably related to the legitimate objectives of management." (Citation omitted.) The rule of conduct herein permitting discipline of an employee for theft, including discharge, is reasonable. For management to weigh the severity of discipline, to be determined by the nature and frequency of the infraction, is likewise reasonable.

6. An arbitrator is to take into account any existing common law of a particular plant or industry as it is an integral part of a collective bargaining agreement. (Citations omitted.)

7. An arbitration award must be vacated if it is so unfounded in reason and fact and so contrary with the wording and purpose of the agreement as to manifest an infidelity to the obligation of the arbitrator. (Citations omitted.)

8. In keeping with the Findings of Fact and Conclusions of Law herein, a separate Judgement will be entered vacating the arbitration opinion and award by May 28, 1986...in which Conoco was directed to reinstate the employment of the grievant...as the Court has determined as a matter of law herein that Conoco properly terminated the grievant...under the contract's Just Cause provision.

The Union appealed to the United States Court of Appeals for the Tenth Circuit and it is from that Court's decision rendered *per curiam* on September 12, 1988, that the Petitioners seek a Writ of Certiorari.

Federal jurisdiction in the court of first instance was based upon 29 U.S.C. § 185 and 28 U.S.C. § 1332.

REASONS FOR GRANTING THE WRIT

I. THE COURT OF APPEALS ENTERED A DECISION WHICH DEVIATES SO DRASTICALLY FROM VERY RECENT DECISIONS OF THIS COURT THAT REVIEW IS WARRANTED. THE DECISION OF THE COURT OF APPEALS CONFLICTS WITH THE PRECEDENCE OF THIS COURT AS IS APPARENT FROM THE RATIONALE RELIED UPON BY THE COURT OF APPEALS.

This Court could not have more clearly pronounced the rules of law to be applied in determining whether to vacate an arbitrator's award than in the recent case of *United Paperworkers International Union, AFL-CIO v. Misco, Inc.*, 484 U.S. __, 108 S.Ct. 364 (1987). Before delving into the specific facts before the Court in that case, the opinion authored by Justice White reestablished and indeed strengthened rules to be utilized in analyzing whether arbitrator's awards should be overturned. Recognizing the federal policy of settling labor disputes by arbitration, this Court made it clear that courts are not authorized to reconsider the merits of an award, even though the parties may allege that the award rests on errors of fact or on misinterpretation of the contract. *Id.*, 108 S.Ct. at 370.

Although the Court of Appeals below gave lip service to the standard to be utilized, this Court once again stated the standard that, as long as the arbitrator's award draws its essence from the collective bargaining agreement and is not merely his own brand of industrial justice, the award is legitimate. *Id.*

However, the *Misco* decision did far more than merely repeat standards set forth in other decisions of the Court. The decision reaffirms the great deference which must be given to arbitral decisions from judicial review. As this Court stated, "it is the arbitrator's view of the facts and of the meaning of the contract that they have agreed to accept. Courts thus do not sit to hear claims of factual or legal error by an arbitrator as an appellate

court does in reviewing decisions of lower courts." *Id.* Of particular importance in the within matter is this Court's discussion surrounding the issue of remedies entered by an arbitrator. This Court stated: "If the courts were free to intervene on these grounds [grounds concerning remedies awarded] the speedy resolution of grievances by private mechanisms would be greatly undermined" *Id.* at 371.

Finally, and most importantly for purposes of the within Petition, this Court specifically expanded upon the oft-repeated standard surrounding the arbitrator's award drawing its essence from the collective bargaining agreement by holding as follows:

> . . . So long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, that a court is convinced he committed serious error does not suffice to overturn the decision.

Id. It is because the United States Court of Appeals for the Tenth Circuit disregarded the precedent of this Court in, in essence, vacating the arbitrator's award because the court disagreed with that award, that the Petition should be granted.

One need only review the Order and Judgment of the Tenth Circuit to see that the court below used strained logic and ignored this Court's directives to come to the ultimate conclusion rendered. The Court of Appeals overturned the arbitrator's award because the arbitrator stated that employees must be treated equally. However, the Court of Appeals went beyond its authority to act in pulling that statement out of context and finding that such a conclusion was not found in the collective bargaining agreement. The error lies in the fact that the arbitrator was obviously referring to the principle of disparate treatment. Indeed, it was because different employees charged with the same rule violation were treated so drastically different than the employee in the current case that the arbitrator determined that the punishment should be reduced from discharge to a period of suspension without pay, albeit a healthy eight-month period without pay compared with punishment for other acts of theft.

If the Court of Appeals was truly reviewing the arbitrator's decision to ascertain whether his decision drew its essence from the collective bargaining agreement, the Court of Appeals would have necessarily allowed the arbitrator's award to stand. The Court of Appeals completely ignored the fact that the rules and regulations established by management did not require discharge given acts enumerated, including acts of theft. This is evident in the fact that employees found guilty of theft before Mr. Streeter's incident were given mild disciplinary treatment by the Company. The Rules of Conduct as described above, state that employees *may* be disciplined for violation for the listed offenses and that the severity of the discipline will be determined by the nature and frequency of the infraction and *may* include termination.

Notwithstanding that the contract, including the Rules of Conduct, were clear and unambiguous on their face, with respect to the fact that discipline could be meted out in varying degrees, the Court of Appeals held that the arbitrator had no authority to reduce Mr. Streeter's termination to a suspension without pay far greater than any discipline meted out by the Company for theft of Company property. A court should not interfere with an arbitrator's decision unless it could be said with positive assurance that the contract is not susceptible to the arbitrator's interpretation. *United Steelworkers of America v. Enterprise Wheel and Car Corp.*, 363 U.S. 593, 599 (1960).

It is this deference mandated by this Court's decisions that was ignored by the Court of Appeals below. It is because the Court of Appeals allowed itself to, in essence, re-try the merits of the case and establish discipline in tune with what the Court of Appeals believed was the appropriate punishment that evidences the greatest deviation from this Court's rulings. Only this Court, in its ability to review matters with an eye towards the correct application of law, can rectify this serious error. It is for these reasons that the Petition should be granted.

CONCLUSION

The Petitioners respectfully request that the Petition for Writ of Certiorari be granted.

Respectfully submitted:

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APPENDIX

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UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

CONOCO INC.,	)	
	)	
Plaintiff-Appellee,	)	
	)	
v.	)	No. 87-1482
	)	(D.C. No. 86-1639)
OIL, CHEMICAL & ATOMIC WORKERS INTERNATIONAL UNION, (AFL-CIO), and its LOCAL 5-857,	)	W.D. Okla.)
	)	
Defendants, Counterclaimants-Appellants.	)	

ORDER AND JUDGMENT

Before ANDERSON, TACHA, and BRORBY, Circuit Judges

This appeal raises the issue of whether an arbitrator exceeded his authority under the labor agreement and imposed his own sense of industrial justice. The arbitrator's award reinstated an employee whom the employer had discharged and imposed a seven-month suspension. The district court vacated and set aside the arbitrator's award and entered an order in favor of the employer discharging the employee. We affirm.

Conoco, Inc., a major refiner of petroleum products, owns a refinery located in Ponca City, Oklahoma. The Oil, Chemical and Atomic Workers (OCAW) International Union is a labor union certified as the bargaining representative for employees at the Ponca City refinery. OCAW and Conoco entered into a collective

bargaining agreement which contains a limited arbitration clause. Section 13 of the agreement begins by stating that all "hiring, maintaining order and discipline or discharge for just cause are solely the responsibility of management." The section ends with the following: "[g]rievances originating under section 13 are subject to the grievance procedure but cannot be submitted to arbitration; and no arbiter has the authority to rule on Section 13 with the exception of determination of just cause in the first sentence of Section 13."

A member of OCAW, Allen Steeler, was caught with $5,900 worth of stolen tools and equipment owned by Conoco. The items, which had been taken by Steeler and others over his twenty-three years of employment, were found in a large barn on Steeler's property. He eventually pled guilty to knowingly concealing stolen property. Steeler was initially suspended pending investigation of the charges and later terminated for violation of a company rule prohibiting any criminal activity including stealing. The OCAW grieved Steeler's dismissal under the just cause provision of Section 13 and the dispute was submitted for arbitration.

The basis of the grievance was that three other Conoco employees, who also had been involved with some form of stealing, had not been discharged but merely suspended for the offense. At the hearing, the union presented evidence of one employee who was caught taking some pieces of pipe to his truck for which he received a three-week suspension. Another employee was found with nine cases of motor oil under suspicious circumstances and had a four-week suspension imposed. The third employee was caught stealing a pair of coveralls and a few office supplies for which he was penalized with a ten-day suspension.

The arbitrator found that, although stealing was normally a dischargeable offense, discharge in the present case was too severe a penalty because Conoco had not discharged the employees in the previous cases. The arbitrator based this decision on the principle that the employer must treat all employees equally. He reasoned that if theft is a dischargeable offense, it

must be equally applied to all employees, apparently even for different offenses. In light of the minor penalty imposed in the other theft-related cases, the arbitrator reinstated Steeler with full seniority, but no back pay, thereby imposing a seven-month suspension. Conoco filed a motion to vacate the award in district court and OCAW filed a motion to confirm the award.

In its motion to vacate, Conoco argued that the arbitrator ignored certain established disciplinary rules of the company which, it contended, should legally be considered part of the agreement. At all times relevant to this case, Conoco had established Rules of Conduct which were issued in the employee handbook, posted at the factory and frequently distributed to employees. These rules included a prohibition regarding "the violation of any criminal law or the commission of any other offense involving moral corruption (including physical attack on other employees), stealing, or making fraudulent records." For violation of any rule, the rules specifically stated that the "severity of discipline will be determined by the nature and frequency of the infraction and may include termination."

The district court concluded the arbitrator disregarded the exiting common law of the particular industry and imposed his own brand of industrial justice. The district court further found the arbitrator's award was arbitrary and did not draw its essence from the agreement. On appeal, the union contends the trial court incorrectly applied the proper standard for reviewing an arbitration award and thereby exceeded its jurisdiction, alleging the court reviewed the award on its merits.

"An arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice . . . [H]is award is legitimate only so long as it draws its essence from the collective bargaining agreement." *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960). The permissible scope of review is strictly limited to ascertaining whether the award draws its essence from the contract. *Fabricut, Inc. v. Tulsa General Drivers, Local 523*, 597 F.2d 227, 229 (10th Cir. 1979). The appellate court cannot review the merits of the award. If the

arbitrator was "even arguably construing or applying the contract and acting within the scope of his authority," the court cannot interfere even if the court is convinced that the arbitrator has committed a serious error in reasoning. On the other hand, the arbitrator cannot ignore the plain language of the contract and impose its own notions of industrial justice. *United Paperworkers Int'l Union v. Misco, Inc.*, ___ U.S. ___, 108 S.Ct. 364, 371 (1987); *Sterling Colorado Beef Co. v. United Food & Commercial Workers, Local Union No. 7*, 767 F.2d 718, 720 (10th Cir. 1985).

The Supreme Court has held that established rules and practices of an industry create an industrial common law "which is equally a part of the collective bargaining agreement although not expressed in it."[1] *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 (1960); *Mistletoe Express Serv. v. Motor Expressmen's Union*, 566 F.2d 692, 694 (10th Cir. 1977). Conoco argues this language in *Warrior & Gulf* requires that the Rules of Conduct promulgated by the management and distributed to the employees should be considered a binding part of the agreement.

The Eighth Circuit faced this same issue in *International Ass'n of Heat & Frost Insulators, Local Union 34 v. General Pipe Covering, Inc.*, 792 F.2d 96 (8th Cir. 1986). In that case, the company argued that the previous practice of the company Trade Board was incorporated into the agreement by virtue of the Supreme Court's ruling in *Warrior & Gulf*. In past awards, the Trade Board had allegedly limited its awards to $5,000. While questioning whether such a practice was even established, the court rejected the company's argument stating, "[w]hile we do not agree that the $5,000 limit became a binding part of the Agreement through the Trade Board's past practice,

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[1] "One cannot reduce all the rules governing a community like an industrial plant to fifteen or even fifty pages. Within the sphere of collective bargaining, the institutional characteristics and the governmental nature of the collective bargaining process demand a common law of the shop which implements and furnishes the context of the agreement." *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. at 582.

it is one factor which may be considered in determining whether the fine imposed was within the essence of the Agreement." *Id.*, 792 F.2d at 101. We concur with this reasoning. Although the Rules of Conduct are not wholly binding as a part of the agreement, they are essential guidelines to determine whether the arbitrator based his award on an interpretation of the contract or instead founded the award on some body of thought, feeling, policy or law that is outside the contract. *See Ethyl Corp. v. United Steelworkers*, 768 F.2d 180 (7th Cir. 1985), *cert. denied*, 475 U.S. 1010 (1986).

The arbitrator correctly concluded that past practices of discipline are part of the industrial common law. The arbitrator, however, based his decision on a principle not found anywhere in the agreement or the industrial common law when he stated employees must be treated equally, regardless of the severity or frequency of the offense. In his decision, the arbitrator recognized that the theft in this case was "over a much longer period of time and amounts to much larger monetary value." No one disputes the arbitrator's findings of fact. The essence of his ruling, however, in light of the facts is that an employer who fails to discharge one employee for a minor infraction under suspicious circumstances is estopped from discharging an employee for serious and continuous violations of a company rule prohibiting stealing. We find no rational support in the express terms of the contract or in the industrial common law for such a conclusion. The agreement vests in the management sole responsibility for discipline and discharge for just cause. Pursuant to this authority, the management implemented specific rules of conduct. The arbitrator had no authority to ignore these specific rules of conduct and, instead, imposed a contrary all-or-nothing rule of discipline.[2] The arbitrator derived his decision from a policy or body of thought outside the contract, rather than from the agreement and the existing industrial common law. The arbitrator, therefore, exceeded his authority.

---

[2]The grievance and arbitration provisions of the labor agreement provided that the arbitrator "shall have no power to add to or subtract from or modify in any way the terms of the Agreement."

An arbitrator must consider any existing common law of the particular plant or industry in reaching its decision. *Trailways Lines, Inc. v. Trailways Lines, Inc. Joint Council*, 807 F.2d 1416, 1423 (8th Cir. 1986); *Clinchfield Coal Co. v. United Mine Workers, Local Union No. 1452*, 720 F.2d 1365 (4th Cir. 1983); *Norfolk Shipbuilding and Drydock Corp. v. Local No. 684, Int'l Bhd. of Boilermakers*, 671 F.2d 797, 799-800 (4th Cir. 1982). The Rules of Conduct explicitly state that the severity of the discipline, including termination, can vary depending on the nature and frequency of the offense. In the present case, the arbitrator failed to address or in any way distinguish the established rules of conduct which directly conflicted with the basis of his decision. *Cf. Campo Machining Co., Inc. v. Local Lodge No. 1926, Int'l Ass'n of Machinists*, 536 F.2d 330 (10th Cir. 1976) (arbitrator discussed and distinguished disciplinary rules from the expressed terms of the agreement); *Trailways Lines, Inc. v. Trailways Lines, Inc. Joint Council*, 807 F.2d at 1424 (agreement provision and past practices clearly relevant to the issue not addressed by arbitrator).

We conclude that the award did not draw its essence from the agreement because it exceeded the confines of interpreting and applying the contract. Aside from the imported principle that employees must be treated equally for different offenses, the arbitrator found there was just cause for discharge when he stated that theft was a dischargeable offense. We, therefore, conclude the district court's order reinstating the penalty of discharge should be AFFIRMED.

ENTERED FOR THE COURT
PER CURIAM

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

CONOCO INC.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. CIV-86-1639-BT
	)	
OIL, CHEMICAL, AND ATOMIC WORKERS INTERNATIONAL UNION, (AFL-CIO), and its LOCAL 5-857,	)	
	)	
Defendant.	)	

FINDINGS OF FACT
AND
CONCLUSIONS OF LAW

This case comes on for decision before the Court, sitting without a jury, relative to Plaintiff seeking to vacate an arbitrator's award and Defendant's Counterclaim seeking to enforce the arbitrator's award. The parties have provided an agreed record for the Court's consideration.

In the Final Pretrial Order filed on January 13, 1987, the parties submitted the following joint statement of the case:

"The Plaintiff is a major refiner of petroleum products and operates a refinery in Ponca City, Oklahoma. The Defendant is a labor union certified as the bargaining representative for employees at the Ponca City refinery. Mr. Allen Streeter was a member of the Union and an employee at the Plaintiff's Ponca City refinery at all times material hereto. The agreement in effect for the time period relevant hereto was effective for a period of two years beginning on April 14, 1986.

"On October 10, 1985, the Plaintiff terminated Mr. Streeter's employment for stealing property from Conoco and its various

contractors and having knowingly concealed the same. The Union objected to the termination. The case was submitted to arbitration in accordance with the collective bargaining agreement. Said agreement provides for arbitration to determine the existence of 'just cause' for discipline or discharge of refinery employees. On May 23, 1986, Arbitrator Preston J. Moore issued an arbitration opinion and award in which he sustained the grievance and ordered reinstatement of Mr. Streeter with full benefits and seniority but without back pay.

"On July 30, 1986, the Plaintiff filed a Complaint seeking vacation of the arbitration award. On or about September 11, 1986, the Defendant filed a Counterclaim seeking enforcement of the arbitration award which the Plaintiff has opposed."

After considering the evidence in the agreed record, arguments of counsel, and the applicable legal authority, the Court enters the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

I. The parties [Conoco Inc. ("Conoco") and Oil, Chemical and Atomic Workers International Union, (AFL-CIO) and its Local 5-857 (Union")] on December 29, 1986, provided the following Stipulated Statement of Facts:

"1. The Plaintiff, CONOCO, Inc., is a Delaware corporation duly domesticated and doing business in the State of Oklahoma.

2. The Plaintiff is a major refiner of petroleum products and operates a petroleum refinery and other ancillary administrations upon premises located at 1100 S. Pine, Ponca City, Kay County, Oklahoma.

3. The Defendant, OIL, CHEMICAL AND ATOMIC INTERNATIONAL UNION, (AFL-CIO) and its LOCAL 5-857, (hereinafter referred to as "the UNION") is an unincorporated association and labor organization with its principal offices located at 225 Union Blvd., Lakewood, Colorado and at 1202 W. Ponca, Ponca City, Kay County, Oklahoma, respectively.

4. Effective on April 14, 1984, CONOCO and the UNION entered into a two-year collective bargaining agreement with respect to CONOCO's facilities in Ponca City, Oklahoma. Attached as Exhibit A to the Stipulated Statement of Facts is a true and correct copy of said collective bargaining agreement.

5. Allen Streeter was, at all times material hereto, a member of the UNION and an employee of CONOCO at the refinery.

6. Allen Streeter was hired by CONOCO in 1963 and continued to work at the Ponca City refinery until his termination in 1985.

7. In 1985, Allen Streeter worked at the Ponca City refinery as a unit operator.

8. For as long as the parties can remember, CONOCO has had established Rules of Conduct with regard to its employees at the Ponca City refinery. Such Rules of Conduct have remained largely unchanged.

9. The Rules of conduct are included in an employee handbook delivered to all refinery personnel at the time of their employment.

10. The Rules of Conduct are periodically published or posted at conspicuous locations within the refinery.

11. Since at least May of 1976, the Rules of Conduct applicable to employees in the Ponca City refinery have included a prohibition regarding 'the violation of any criminal law or the commission of any other offense involving moral corruption (including physical attack on other employees), stealing, or making fraudulent records.'

12. Since at least May of 1976, the Rules of Conduct applicable to the Ponca City refinery employees have included a provision that 'severity of discipline will be determined by the nature and frequency of the infraction and may include termination.'

13. The Union has never challenged, grieved, protested or filed a complaint about the reasonableness of the content of the provisions in the Rules of Conduct stated in Paragraphs 11 and 12.

14. The Union had never grieved any discipline imposed for violation of the prohibition in the Rules of Conduct regarding stealing prior to the incident involving Allen Streeter.

15. On December 23, 1976, Delbert Sumter, a Ponca City refinery employee, was given a three week suspension without pay for attempting to steal a few extensions of pipe from the refinery.

16. Mr. Sumter had been caught in the process of mixing said pipe with other extensions of pipe which he owned in the back of his truck.

17. A true and correct copy of the written Employee Warning given to Mr. Sumter by CONOCO at the time of his suspension is attached to the Stipulated Statement of Facts as Exhibit B.

18. On June 16, 1980, Dennis R. Lee, a Ponca City refinery employee, was suspended without pay indefinitely pending investigation of his possession of several cases of Conoco oil. A true and correct copy of the Written Employee Warning given to Mr. Lee at the time of said suspension is attached to the Stipulated Statement of Facts as Exhibit C.

19. The suspension of Dennis R. Lee involved the possession of nine (9) cases of Conoco motor oil with 24 to the case. Such motor oil was worth approximately $216.00.

20. On or about July 10, 1980, John L. Dimond, the Process Superintendent of the Ponca City refinery, wrote Mr. Lee advising him that due to the suspicious circumstances involving his possession of several cases of Conoco oil, he would be permitted to return to work on July 14, 1980, but would not be paid for the four weeks he had been suspended. A true and correct copy of said letter is attached to the Stipulated Statement of Facts as Exhibit D.

21. On or about October 10, 1984, Dennis L. Morgan, a Ponca City refinery employee, was given a ten day suspension. Said suspension was imposed due to Mr. Morgan having stolen a pair of Nomex coveralls and some office supplies. A true and correct copy of the written Employee Warning given to Mr. Morgan at the time of his suspension is attached to the Stipulated Statement of Facts as Exhibit E.

22. To the parties' knowledge, the only instances where discipline was imposed for stealing, theft, attempted theft, receipt of stolen property, concealment of stolen property or similar misconduct prior to the termination of Allen Streeter were the suspensions involving Delbert Sumter, Dennis Lee and Dennis L. Morgan.

23. On or about May 31, 1985, a memorandum regarding the Rules of Conduct was prepared by John L. Dimond, the manager of the Ponca City refinery, and posted in various conspicuous places within the refinery. A true and correct copy of said memorandum is attached to the Stipulated Statement of Facts as Exhibit F.

24. On August 26, 1985, the Ponca City Police Crime Stoppers Division received a phone call from a confidential caller who stated that for the previous three years, Mr. Streeter had been stealing tools from CONOCO or its contractors by carrying them out through the gate or by throwing them over the fence and picking them up later in his truck. Said caller stated that items known to have been stolen included hand grinders, crescent wrenches, chain hoist, impact tools, welding cords, flood lights, torches and grinders. Said caller stated that he had personally been at Mr. Streeter's residence and observed a large metal building located on the property which was full of thousands of dollars worth of tools belonging to CONOCO and its contractors.

25. On August 27, 1985, Kay County Deputy Sheriff Glenn Guinn observed Mr. Streeter leaving CONOCO's Ponca City refinery carrying a grocery bag appearing to be about three-fourths full which he placed in his pickup truck and drove to his residence.

26. On August 28, 1985, Deputy Guinn observed Mr. Streeter coming out of the Ponca City refinery carrying a large package on his shoulder. Mr. Streeter carried the package through the exit gate to his pick-up and drove to his residence.

27. On August 29, 1985, Deputy Guinn executed an Affidavit for Seizure Warrant which was presented to Kay County District Judge Lowell Doggett. A true and correct copy of said Affidavit for Seizure Warrant is attached to the Stipulated Statement of Facts as Exhibit G.

28. Kay County District Judge Lowell Doggett issued two Seizure Warrants with respect to Mr. Streeter.

29. On August 30, 1985, officers from the Kay County Sheriff's office conducted a search of a silver metal building located on the premises Mr. Streeter's residence. Said building was apparently an old barn containing a least four separate rooms. The building contained a very substantial amount of tools and equipment, much of which bore identification markings of Conoco or its contractors.

30. At the request of the Kay County Sheriff's office, CONOCO rented an 8′ × 42′ moving van from a local moving company. The officers loaded a portion of the tools and equipment which could be identified as belonging to CONOCO or its contractors onto the van and drove the same to the Sheriff's office in Newkirk, Oklahoma where the van was locked.

31. Deputy Sheriff Guinn made a tape recording narrating the time and nature of events occurring on August 30, 1985. A true and correct transcription of the contents of said tape recording is attached to the Stipulated Statement of Facts as Exhibit I.

32. Officers from the Kay County Sheriff's office prepared a written inventory of the contents of the van. A true and correct copy of said inventory is attached to the Stipulated Statement of Facts as Exhibit I.

33. Allen Streeter was arrested by the Kay County Sheriff's office on August 30, 1985, and charged with knowingly concealing stolen property.

34. On August 30, 1985, CONOCO suspended Allen Streeter with pay pending investigation of charges of possible theft and/or wrongful possession of CONOCO property.

35. On or about September 5, 1985, Mr. Allen Streeter was suspended without pay by CONOCO.

36. On or about September 17, 1985, several tools and equipment from the moving van were released to CONOCO by the Sheriff's office. An inventory of such tools and equipment was made by the Sheriff's office. A true and correct copy of such inventory is attached to the Stipulated Statement of Facts as Exhibit J.

37. Several tools and equipment were released by the Kay County Sheriff's office from the items contained in the moving van to Mel Crisp, a contractor for CONOCO. An inventory of such tools and equipment was made by the Kay County Sheriff's office. A true and correct copy of said inventory is attached to the Stipulated Statement of Facts as Exhibit K.

38. Several tools and equipment were released by Kay County Sheriff's office from the items contained in the moving van to Mickey Cantwell, a contractor for CONOCO. An inventory of such tools and equipment was made by the Kay County Sheriff's office. A true and correct copy of said inventory is attached to the Stipulated Statement of Facts as Exhibit L.

39. On October 3, 1985, pursuant to a plea bargain agreement reached with the Kay County District Attorney, Allen Streeter returned to CONOCO additional stolen tools and equipment valued at approximately $1,000.00.

40. On October 9, 1985, John L. Dimond, Manager of the Ponca City refinery, notified Mr. Streeter in writing that his employment was being terminated as of October 10, 1985. A true and correct copy of such written notification is attached to the Stipulated Statements of Facts as Exhibit M.

41. On October 17, 1985, Allen Streeter pleaded guilty to knowingly concealing stolen property. Mr. Streeter was given a three year suspended sentence with non-supervisory probation and court ordered counseling. A true and correct copy of the Judgement and Sentence on Plea of Guilty is attached to the Stipulated Statement of Facts as Exhibit N.

42. On or about October 18, 1985, the UNION notified CONOCO in writing of its disagreement with CONOCO's decision to terminate Mr. Streeter's employment and requested arbitration. A true and correct copy of said written notification is attached to the Stipulated Statement of Facts as Exhibit O.

43. On November 5, 1985, James F. Sweeney, a Special Investigator, submitted to CONOCO a written report of his investigation regarding Allen Streeter. A true and correct copy of said report is attached to the Stipulated Statement of Facts as Exhibit P.

44. Mr. Streeter sought therapy at Bi-State Mental Healthy Clinic prior to his termination, but not prior to his arrest.

45. On April 3, 1986, Jane A. Wahl, a psychological associate with the Bi-State Mental Health Foundation wrote to Mr. Walter F. Brune, counsel for the UNION. A true and correct copy of said letter is attached to the Stipulated Statement of Facts as Exhibit Q.

46. Mr. Streeter's actual job performance was good.

47. Mr. Streeter engaged in theft of Conoco property repeatedly during virtually all 23 years of his employment at the Conoco refinery and personally stole many of the items listed on Exhibits I, J, K and L.

48. Mr. Streeter knowingly concealed all of the stolen property reflected on Exhibits I, J, K and L.

49. Part of the property listed on Exhibits I, J, K and L were stolen from Conoco by Mr. Streeter's relatives or were tools received by retirees who were given their tools on retirement by Conoco, Inc.

50. In accordance with the proper grievance and arbitration procedure, an arbitrator was selected and an arbitration hearing was held on April 16, 1986.

51. CONOCO presented a written opening statement to the arbitrator, a true and correct copy of which is attached to the Stipulated Statement of Facts as Exhibit R.

52. At the arbitration hearing, the matters of facts and exhibits which have been stipulated to in Paragraphs 1 through 51 were presented to the arbitrator.

53. Mr. Streeter testified to the arbitrator that he would not in the future take anything from Conoco if he were allowed to return to work and that he desired to return.

54. At the time of the arbitration hearing, Mr. Streeter had lost over six months of employment and income as a result of his suspension without pay.

55. On May 14, 1986, the UNION filed its Post-Hearing Brief. A true and correct copy of the Post-Hearing Brief is attached to the Stipulated Statement of Facts as Exhibit S.

56. On May 15, 1986, Conoco filed its Post-Hearing Brief. A true and correct copy of said Post-Hearing Brief is attached to the Stipulated Statement of Facts as Exhibit T.

57. On May 23, 1986, Arbitrator Preston J. Moore issued his arbitration opinion and award. A true and correct copy of said award is attached to the Stipulated Statement of Facts as Exhibit U.

58. On June 25, 1986, the UNION requested a decision as to whether or not the company would honor the arbitration award and return Mr. Streeter to work. A true and correct copy of such request is attached to the Stipulated Statement of Facts as Exhibit V.

II. Pertinent provisions of the Management's Rights clause of the Agreement between the parties state (Exhibit A, Section 13):

"Hiring, maintaining order, and discipline or discharge for just cause are solely the responsibility of Management.

* * *

"Grievances originating under Section 13 are subject to the grievance procedure but cannot be submitted to arbitration; and no arbiter has the authority to rule on Section 13 with the exception of determination of just cause in the first sentence of Section 13."

III. In Section 21, Article 5, Step 5 of the Agreement (Exhibit A) provides for the selection of an arbitrator who, ". . . shall have no power to add to or subtract from or modify in any way any of the terms of the Agreement."

IV. As set forth in Paragraph I, Stipulated Statement of Facts Nos. 8 through 12, employer established and acknowledged employee written Rules of Conduct (Exhibit F) provide for prohibition against "the violation of any criminal law or the commission of any other offense involving moral corruption (including physical attack on other employees), stealing, or making fraudulent records." Further, said rules of conduct provide, "severity of discipline will be determined by the nature and frequency of the infraction and may include termination." Such written established and accepted Rules of Employee Conduct are a part of the collective bargaining agreement and where relevant, to be followed by the arbitrator.

V. The arbitrator in the arbitration opinion and award (Exhibit U, page 6) made the following statements concerning employee theft from the employer:

". . . There can be no question that such offenses are serious violations of the work rules and are normally met with severe penalty such as discharge. Repeatedly, this arbitrator has stressed that theft is a discharge offense and the arbitrator has no authority to modify the discipline."

Thus, the arbitrator determined that theft is a just cause for discharging an employee.

VI. The arbitrator, however, concluded that employee Streeter

could not be discharged because the other three incidents of employee theft resulted only in temporary suspension. The arbitrator stated at page 7 of the arbitration opinion and award:

> "At the same time, the Employer must treat all employees equally. If theft is a discharge offense, it must be equally applied to all employees. For that reason and for the reason that such was not the case herein, the discipline assessed by the Employer is too severe because it is far, far in excess of any discipline assessed other employees . . ."

VII. The Stipulated Statement of Facts clearly establish that Streeter's theft was much more severe due to the number of items stolen, the value, and the fact that his thievery and concealment of stolen property persisted over his twenty-three years of employment. Streeter conceded that the approximate value of the many stolen or concealed items of property was $5,900.00. (Exhibit U, p. 3).

VIII. In concluding that all incidents of employee theft must be treated equally, the arbitrator disregarded the Agreement between the parties, as well as the facts of the Streeter theft and concealment, and thereby imposed his own brand of industrial justice.

IX. The Streeter theft and concealment of stolen property provided just cause for his discharge and the arbitrator's setting aside of the discharge and imposing a six-month suspension was arbitrary and did not draw its essence from the Agreement.

CONCLUSION OF LAW

1. The Court has jurisdiction of the parties and of the subject matter herein. 28 U.S.C. § 1337. The Court has proper venue under 29 U.S.C. § 185(a), 28 U.S.C. § 1391(b), and 9 U.S.C. § 10.

2. Any Finding of Fact above which might be properly characterized a Conclusion of Law is incorporated herein.

3. An arbitrator is confined to interpreting and applying the collective bargaining agreement between the parties and the arbitrator's award must draw its essence from said agreement. *United Steelworkers of America v. Enterprise Wheel and Car*

Corp., 363 U.S. 593 (1960); *International Union of Operating Engineers v. Shank-Artukovich*, 751 F.2d 364 (10th Cir. 1985); *International Brotherhood of Painters and Allied Trades v. Williams and Kelly, Inc.*, 605 F.2d 535 (10th Cir. 1979); and *Mistletoe Express Service v. Motor Expressmen's Union*, 566 F.2d 692 (10th Cir. 1977). In *Mistletoe Express Service, supra*, the Court of Appeals in vacating the arbitrator's award stated:

> "In reducing the penalty from discharge to suspension, the arbitrator substituted his views of proper industrial relationships for the provisions of the contract. He expressly found that there was just cause for discipline. The contract says that the acts, which the arbitrator found are just cause for discipline, are just cause for discharge. The arbitrator may not rewrite the labor contract." 566 F.2d at 695.

4. The employee Rules of Conduct (Exhibit F), which have been adopted and followed at the refinery for as long as the parties can remember, are an extension of the contract pursuant to the management rights given to Conoco by specific contractual provisions, as well as by recognized implied right.

The Rules of Employee Conduct (Exhibit F) constitute the "common law of the shop" which the arbitrator was required to accept, respect and enforce. In the case of *United Steelworkers of America v. Warrior and Gulf Navigation Company*, 363 U.S. 574 (1960), Justice Douglas stated:

> "There are too many people, too many problems, too many unforeseeable contingencies to make the words of the contract an exclusive source of rights and duties. One cannot reduce all the rules governing a community like an industrial plant to fifteen or even fifty pages. Within the sphere of collective bargaining, the institutional characteristics and the governmental nature of the collective bargaining process demand a common law of the shop which implements and furnishes the context of the agreement."
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> * * *
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> "The labor arbitrator's source of law is not confined to the express provisions of the contract, as the industrial common

law — the practices of the industry and of the shop — is equally a part of the collective bargaining agreement although not expressed in it." 363 U.S. at 579-82 (quoting Cox, Reflections Upon Labor Arbitration, 72 Harv. L. Rev. 1482, 1498-99 (1959)).

See also, Transportation-Communication Employees Union v. Union Pacific Railroad Company, 385 U.S. 157 (1966); and *John Wiley and Sons, Inc. v. Livingston*, 376 U.S. 543 (1964).

5. Management has the right unilaterally to establish reasonable plant rules not inconsistent with law or the collective bargaining agreement. The test of the reasonableness of a plant rule is "whether or not the rule is reasonably related to the legitimate objectives of management." Elkouri & Elkouri, *How Arbitration Works*, 4th Ed. (1985), pp. 553-55. The rule of conduct herein permitting discipline of an employee for theft, including discharge, is reasonable. For management to weigh the severity of discipline, to be determined by the nature and frequency of the infraction, is likewise reasonable.

6. An arbitrator is to take into account any existing common law of the particular plant or industry as it is an integral part of the collective bargaining agreement. *Norfolk Shipbuilding and Drydock Corp. v. International Brotherhood of Boilermakers*, 671 F.2d 797 (4th Cir. 1982); *Clinchfield Coal Co. v. United Mine Workers of America*, 720 F.2d 1365 (4th Cir. 1983); and *Raybestos-Manhattan v. Amalgamated Clothing and Textile Workers*, 545 F.Supp. 387 (D.S.C. 1982).

7. An arbitration award must be vacated if it is so unfounded in reason and fact and so contrary with the wording and purpose of the agreement as to manifest an infidelity to the obligation of the arbitrator. *Mistletoe Express Service v. Motor Expressmen's Union*, 566 F.2d 692 (10th Cir. 1977); *Fabricut, Inc. v. Tulsa General Drivers, Warehousemen and Helpers*, 597 F.2d 227 (10th Cir. 1979); *International Union of Operating Engineers v. Shank-Artukovich*, 751 F.2d 364 (10th Cir. 1985); and *United Food and Commercial Workers v. Gold Star Sausage Co.*, 487 F.Supp. 596 (D.Col. 1980).

8. In keeping with the Findings of Fact and Conclusions of Law herein, a separate Judgment will be entered vacating the arbitration opinion and award of May 28, 1986 (Exhibit U) in which Conoco was directed to reinstate the employment of the grievant, Allen L. Streeter, as the Court has determined as a matter of law herein that Conoco properly terminated the grievant, on October 10, 1985, under the contract's Just Cause provisions.

DATED this _____ day of December, 1988.